United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2326

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

In the Matter

of

D. H. OVERMYER CO., INC.
(Incorporated under the laws
of Florida),

Debtor.

Appeal No.
74-2326

CIVIC PARKING SQUARE, INC.,
JOSEPH J. RUBIN and ANNE RUBIN,

Plaintiffs-Appellees,

-against-

ROBERT P. HERZOG, as Receiver of
D. H. OVERMYER CO., INC. OF FLORIDA
and D. H. OVERMYER CO., INC. OF
FLORIDA,

Defendants-Appellants.

In Proceedings for
an Arrangement
73 B 1134

----------x

B

P/S

BRIEF OF PLAINTIFFS-APPELLEES

ZALKIN, RODIN & GOODMAN
Attorneys for Plaintiffs-Appellees
750 THIRD AVENUE
NEW YORK, N. Y. 10017

5

TABLE OF CONTENTS

CASES CITED

STATUTES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

In the Matter

of

D. H. OVERMYER CO., INC.
(Incorporated under the laws
of Florida),

Debtor.

Appeal No.
74-2326

In Proceedings
for an Arrangement
73 B 1134

CIVIC PARKING SQUARE, INC.,
JOSEPH J. RUBIN and ANNE RUBIN,

Plaintiffs-Appellees,

-against-

ROBERT P. HERZOG, as Receiver of
D. H. OVERMYER CO., INC. OF FLORIDA
and D. H. OVERMYER CO., INC. OF
FLORIDA,

Defendants-Appellants.

----------x

BRIEF OF PLAINTIFFS-APPELLEES

PRELIMINARY STATEMENT

Defendants-appellants appeal from a decision of Judge Werker affirming the orders of Bankruptcy Judge Babitt granting the applications of some twenty landlords of the various D. H. Overmyer Co., Inc. entities (hereinafter collectively referred to as "Debtor") to terminate the leases entered into with Debtor. Plaintiffs-appellees ("Landlord")

are the owners of the premises known as Jacksonville #3 and submit this brief to demonstrate that Judge Werker's decision is amply supported by the record in this case and should be affirmed. In accordance with the agreement among the parties and as approved by this Court, this brief will be limited to an analysis of Judge Werker's decision. A complete discussion of the issues in this case is contained in Landlord's brief submitted to the District Court, a copy of which is annexed hereto as Exhibit A.

ISSUES PRESENTED

Did the District Court commit reversible error in affirming Bankruptcy Judge Babitt's orders declining to bar enforcement of bankruptcy clauses in the respective leases among the parties, where the record fully supports the trial court's exercise of its discretion?

Did the District Court commit reversible error in declining to remand the proceedings to the trial court for specific findings of fact and conclusions of law where the basis of the trial court's findings are fully set forth in that court's opinion?

ARGUMENT

POINT I

JUDGE WERKER'S DECISION AFFIRMING BANKRUPTCY JUDGE BABITT'S ORDERS IS CORRECT, FULLY SUPPORTED BY THE RECORD AND SHOULD BE AFFIRMED

Judge Werker's 18 page scholarly opinion carefully analyzes the criteria to be utilized by trial courts in determining when to exercise equitable power to bar enforcement of bankruptcy termination clauses in leases and then applies these criteria to the facts of the case at bar. The thoroughness of the Court's evaluation is demonstrated by the fact that the Court read the entire transcripts in all of the cases on appeal (13)*.

A. The Equities Favor the Landlords

In his opinion, Judge Babitt concluded that "on the facts here, and in the exercise of its equitable jurisdiction" the termination clauses should be enforced (55). The District Judge concurred. As Judge Werker held:

> "While equity historically has been the forum in which forfeitures may be set aside, no one has suggested that when the equities appear to be evenly balanced or balanced on the side of the forfeiture the Court should grant such relief .... On the record it would appear that for a period of years prior to its filing under the Bankruptcy Act, Overmyer's conduct

---

* Unless otherwise indicated, all references are to pages in the Appendix, Volumes 1 and 2.

> with respect to many of the landlords formed a pattern of consistent failure to meet its rent, repair, mortgage and tax obligations. Just prior to filing its Chapter XI petitions, Overmyer made promises with respect to remedying these defaults which could only have been made with an intention to deceive." (Emphasis supplied) (15).

To be sure, Courts have the power in the appropriate circumstances to relieve a defaulting party of a default, but equity will be done only where it is just that it be done. As Bankruptcy Judge Babitt held:

> "While it may be true that 'equity always leans against them' [forfeitures], Henderson v. Carbondale Coal and Coke Co., 140 U.S. 25, 33 (1891), it is no less true that such is not an absolute or inflexible rule nor that every forfeiture is 'harsh and oppressive' in the words of Circuit Judge Van Devanter (as he then was) in Brewster v. Lanyon Zinc Co., 140 Fed. 801, 819 (8th Cir. 1905)." (46-47).

One of the leading cases in this Court United States v. Forness, 125 F.2d 928 (2d Cir.), cert. denied, 316 U.S. 694 (1942) stands for the same proposition. As Judge Frank held:

> "[I]t is equally well established that ... such relief [against forfeiture] will be granted only to an innocent suitor, i.e., one with clean hands. This requirement bars relief to one who has been negligent - or at least grossly so - or who has inexcusably or deliberately gone into default." 125 F.2d at 140 (Emphasis supplied).

In his brief, the Receiver strives to create strawmen and then knocks them down. For example, the Receiver argues that the Bankruptcy Act does not proscribe broken

promises, long standing defaults and arrearages as grounds for barring confirmation (p. 64). While this may be true, it is absolutely irrelevant to the issue on appeal before this Court. That issue is whether or not the lowers courts committed reversible error in taking into account the inequitable conduct of Debtor, in considering whether to exercise the Court's discretionary powers.

Appellants understandably seek to avoid the consequences of their own improper actions by asserting that Debtor's conduct is merely typical of an individual who is in debt (Receiver's brief p. 61). Not so. This is not a case where a company in an isolated situation falls slightly behind in its rent obligation and in good faith acts to immediately remedy the breach. What the Court found, and it is fully supported by the record, was a pattern and practice of avoidance of just obligations and the calculated utterance of falsehoods to the landlords.

This practice is well illustrated by the events which occurred with regard to the Jacksonville #3 premises. Debtor defaulted in its obligation to pay rent for the months of May, June, July, August and September 1973. Only after suit was commenced by Landlord to evict Debtor and a final judgment granted authorizing issuance of a writ of possession, which writ was temporarily stayed by an Appellate Court, did Debtor pay into Court the back rent. This payment

into Court - which has never been received by Landlord - far from evidencing Debtor's good faith actually demonstrates the reverse. Only after it became clear that failure to pay the monies due would result in loss of possession, did Debtor agree to pay its just obligations.

Indeed, at the same time that Debtor paid back rent into Court to avoid being dispossessed, it promised in writing to continue paying rent to Landlord in accordance with the terms of the lease or immediately to surrender possession of the premises. Stipulation dated October 11, 1973 ¶¶ 3-4 (Exhibit C to Record on Appeal Document No. 24A). Yet despite this promise, rent for the very next month of November 1973 was not paid by Debtor (Record on Appeal Document No. 24E).

In demonstrating Debtor's inequitable conduct, Judge Werker emphasized the promises that Debtor made "with an intention to deceive" (15). Debtor's conduct in immediately violating the Stipulation is eloquent evidence of its total lack of good faith in entering into that agreement.

By contrast, Judge Werker found that "the record is barren ... of any conduct on the part of the landlords which could in any way be described as unfair, overreaching or vexatious." (16).

Under these circumstances, Judge Werker's conclusion that the evidence demonstrates "a course of conduct on

the part of Overmyer which warrants the exercise of discretion in the landlords rather than appellants' favor" is manifestly not clearly erroneous (23-24).

B. There Are No "Windfall Profits"

Throughout these proceedings, appellants have contended that equitable relief must be granted to prevent forfeiture of "valuable assets" and "windfall" to the landlords. The District Judge exploded this myth when he referred to the alleged "windfall" as being "pure speculation" and "largely illusory". As the Court said:

> "In view of the short-term nature of the subleases and the expenses involved in operating the warehouses, this so-called 'windfall' is largely illusory and does not shift the balance of the equities." (17).

Nowhere is the correctness of this finding more clearly demonstrated than in the case at bar. As is set forth in Landlord's brief submitted to the District Court (pp. 3-7), these premises are at best only marginally profitable even when fully rented. Appellants' own figures reflect a profit before taxes of only $380 per month and the actual figure is somewhat less even without taking into account repairs that must be made on this building.

But in reality, as the Court recognized, there is no assurance of so much as a single dollar's worth of profit in this case. The Receiver operated Jacksonville #3 at a loss for the months of December 1973, January 1974, February

1974 and March 1974 (Interrogatory Answer No. 1 in evidence), and thereafter on essentially a break even basis. Indeed, Bankruptcy Judge Babitt noted his displeasure at the retention of this property. As was said:

> "The Court: I cannot understand why you kept the property, Mr. Sandler, and invested that kind of money when at best you will break even?" (Emphasis supplied) (I-8).

There are two short term subleases existing on the premises. One lease expires on November 30, 1974 (Interrogatory Answer No. 2(b) in evidence) and the other lease expires at the end of this year (II-23). Accordingly, within two months, these premises may be totally vacant.

It is in this context that appellants' claims of "loss of valuable assets" and "windfall" must be evaluated and rejected. Judge Werker's finding that the "so-called 'windfall' is largely illusory" is fully supported by the record (17).

C. The Lower Courts' Findings That The Plan Is Not Feasible Is Supported by the Record

Bankruptcy Judge Babitt concluded that Debtor's Plan "carried pie-in-the-sky elements", "ignores ... reality", and "may not be feasible much less in the best interests of its creditors" (53). Similarly, Judge Werker noted that the Plan "has been rejected by the debtors' creditor committees and found to be highly unrealistic by the Bankruptcy Judge." (18). Judge Werker concluded that Debtor "simply cannot be

rehabilitated." (24-25).

The Receiver seeks to minize the damaging nature of these findings by contending that the feasibility of the Plan is irrelevant to the Courts' exercise of its equitable discretion. Such contention is palpably baseless.

In Queens Boulevard Wine & Liquor Co. v. Blum - F. 2d - Docket No. 73-1512 (2d Cir., filed June 11, 1974), the Court held that "under the particular circumstances of this case, termination of Queen's lease would be grossly inequitable ..." (Slip opinion at 10). One of the most important of the circumstances in that case was that the Plan of Arrangement was on the verge of confirmation. Id. at 4.

It would seem axiomatic that if a Plan is unlikely to be confirmed, there is little, if any, reason for a Court to use its equitable powers to prevent landlords from exercising bargained for contractual rights. None of the cases cited by appellants support the proposition that where a company lacks prospects for survival, the Court should nonetheless bar forfeiture. The findings of the lower courts herein as to the lack of feasibility of Debtor's Plan are therefore of great importance and serve to furnish virtually an independent basis for affirmance.

The Receiver contends that it was improper for the lower court not to hold a hearing on the feasibility of

the Plan (Brief at 39). This contention is specious. A hearing on confirmation is held only after the requisite number of acceptances by creditors of the proposed Plan have been filed (Bankruptcy Act § 337, 11 U.S.C. § 737). These acceptances have not been obtained, despite solicitation by Debtor. The reason is readily apparent - the Plan is unacceptable to creditors. A more graphic demonstration of the unfeasibility of this Plan would be difficult to hypothesize.

In conclusion, the lower courts' findings as to the lack of feasibility of the Plan are fully supported by the record.

POINT II

JUDGE WERKER DID NOT COMMIT REVERSIBLE ERROR IN DECLINING TO REMAND TO THE BANKRUPTCY COURT FOR SPECIFIC FINDINGS OF FACT WHERE THE BASIS OF THAT COURT'S FINDINGS ARE FULLY SET FORTH IN THE OPINION

Realizing the weakness of their position on the merits, appellants seek a remand to Bankruptcy Judge Babitt for the making of specific findings of fact. A remand would serve absolutely no useful purpose and merely occasion additional delay to the landlords who have already been severely damaged by Debtor's conduct.

As the discussion in Landlord's brief to the District Court demonstrates (pp.24-27), Judge Babitt complied with the provision of Rule 752 of the Bankruptcy Rules which

provides that it is sufficient if the findings of fact and conclusions of law appear in the Court's opinion.

In his opinion, Judge Werker correctly concluded that the trial court adequately complied with Bankruptcy Rule 752. As was said:

> "The fact that the Bankruptcy Judge did not in each case make separate findings of fact was neither an abuse of discretion nor a clearly erroneous decision. The essential findings with respect to the leases terminated by the landlords before and after the filing of Chapter XI petitions are contained in Judge Babitt's memorandum decision at pages 9, 10 and 11. These findings are sufficient under Bankruptcy Rule 752 for they afford a clear understanding of the grounds on which the Bankruptcy Judge based his decision. It was not necessary that he set forth specific findings with respect to each individual property." (Emphasis supplied) (21-22).

CONCLUSION

This case involves an appeal from a uniquely discretionary determination by Bankruptcy Judge Babitt. Judge Babitt was intimately familiar with the proceedings in the case and was in the best position to judge the creditability of all the witnesses who testified in his courtroom during the many months of trial.

The scope of review of such a determination is exceedingly narrow and limited to whether or not the trial court abused its discretion (see pp.14-18 of Landlord's

brief below). There can be no doubt but that Judge Babitt properly exercised his discretion in denying relief to this Debtor under the circumstances of this case.

Judge Werker carefully reviewed the entire record and concluded that Bankruptcy Judge Babitt's orders should be affirmed. This decision was correct and this Court should affirm in all respects.

Dated: New York, New York
November 12, 1974

Respectfully submitted

ZALKIN, RODIN & GOODMAN
Attorneys for Plaintiffs-
Appellees
Office and Post Office Address
750 Third Avenue
New York, New York 10017

Of Counsel:
Richard S. Toder

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

In the Matter

of

D. H. OVERMYER CO., INC.
(Incorporated under the laws
of Florida),

Debtor.

No. 73 B 1134

CIVIC PARKING SQUARE INC.,
JOSEPH J. RUBIN and ANNE RUBIN,

Plaintiffs,

-against-

ROBERT P. HERZOG, as Receiver of
D. H. OVERMYER CO., INC. (Incorporated
under the laws of Florida), and D. H.
OVERMYER CO., INC. (Incorporated under
the laws of Florida),

Defendants.

----------x

BRIEF OF APPELLEE LANDLORD
OF JACKSONVILLE #3

Issues Presented

1. Did the trial judge commit an abuse of discretion by declining to exercise his equitable power to bar enforcement of bankruptcy clauses in the respective

leases when the landlords have been consistently victimized by the conduct of the tenant-debtor?

2. Did the trial judge commit reversible error by declining to make specific findings of fact and conclusions of Iaw in the twenty related proceedings and instead incorporating the findings of fact and conclusions of law in the Court's opinion?

Preliminary Statement

This is an appeal from a decision by Bankruptcy Judge Babitt granting the applications of some twenty landlords of the various D. H. Overmyer Co., Inc. entities (herinafter collectively referred to as "Debtor") to terminate the leases entered into with Debtor. The carefully considered opinion of the Court, reached only after taking extensive testimony on the facts of each and every application, makes clear that the Court properly declined to exercise its equitable discretion in staying enforcement of the "bankruptcy" clauses contained in respective leases. In no respect can the Court's decision even remotely approach the abuse of discretion standard that would be necessary for reversal.

This brief is filed solely on behalf of the landlord for the premises known as Jacksonville #3. However, as the Receiver in its brief has placed particular emphasis on this property, the facts relating thereto may have an impact beyond the particular property in demonstrating the nature of the persistent inequitable conduct engaged in by Debtor, which conduct the Court found mandated denial of equitable relief in this case.

Facts

In his opinion, Bankruptcy Judge Babitt has fully set forth the nature of Debtor's business and the history of these proceedings (Opinion at pp 4-14) and it would serve no useful purpose to again set them forth at length. However, since the Receiver has chosen to single out Jacksonville #3 as one of the properties where the Court most clearly committed error (Receiver's brief pp 36-38, 51-52), examination of the facts therein serves to underscore the correctness of the Court's decision.

A. Non-Profitability of the Leasehold

The lease between the parties provided for the monthly payment of rental commencing with September 1973 in

the sum of $6,120 (Exhibit A to the Complaint in evidence). Additionally, taxes in the monthly sum of $953 are presently being escrowed by the Receiver (Interrogatory Answer No. 7 (d) in evidence)*. The total monthly obligation to the Landlord is thus $7,073.

In December of 1973 this 80,000 sq. ft. property was fully rented and all subtenants paid their rent to the Receiver. That rent totalled $7,248 (Interrogatory Answer No. 1) and obviously resulted in a loss to defendants after taking into account costs of operating the business.

In January of 1974 Landlord commenced this adversary proceeding seeking termination of this lease. For the month of January, defendants received from the subtenants the sum of $1,248 (Interrogatory Answer No. 1). This difference in receipts was caused by the fact that the subtenant of 70,000 of the 80,000 sq. ft. of this warehouse had vacated the premises (Interrogatory Answer Nos. 2, 5 and 6). Since use and occupation plus escrowed taxes equaled $7,073, a loss in excess of $6,000 was sustained by the estate.

The 70,000 sq. ft. remained vacant for the month of February 1974 and well into March 1974, resulting in a

* Unless indicated otherwise, all interrogatory answers were marked in evidence at the trial.

further loss of some $12,000, or a total of approximately $18,000 since the filing of the petition.

On March 4, 1974, this matter came on before the Court for trial and defendants requested an adjournment in order to attempt to fully rent the premises (Transcript of Proceedings pp. 3-4). At this time, the Court, while granting the adjournment, expressed its concern over the retention of this property. As was said:

> "The Court: I can't understand why you kept the property, Mr. Sandler, and invested that kind of money when at best you will break even?" (Id. at p. 8)

The Court's concern has been borne out by the facts adduced at trial. The vacant space has been sublet at the gross monthly rental of $7,300.56. (Transcript of Trial dated March 26, 1974 ["Tr."] pp. 13-14). However, a monthly commission of 2% of the rental is payable to the rental agent (Tr. 22-23) so that the actual yield to defendants is only $7,155 (2% x $7,300 = $146). Adding the rental paid by the sole other subtenant ($1,248), a gross monthly rental of $8,403 is received by defendants. This gross figure, of course, does not take into account the

administrative expenses necessarily incurred in maintaining this property. Defendants' costs are as follows:

Rent	$6,120.00
Taxes	953.00
Administrative Expenses	1,011.00 *
	$8,084.00

The final result is that this property yields the munificent sum of $319 per month in profit before taxes.

Even this modest amount is subject to further diminution. The lease of the tenant for 10,000 sq. ft. expires on November 30, 1974 (Interrogatory Answer No. 2(b)), and the lease of the new tenant for the 70,000 sq. ft. expires at the end of 1974 (Tr. 23). Therefore, within seven months, these premises could well be completely empty. It will be recalled that the recent tenant for the 70,000 sq. ft. was only secured after a vacancy had existed for almost three months.

Additionally, the testimony of Murray Guy, defendants' engineer, was that repairs - over and above the

* The Court concluded that administrative expenses for a 80,000 sq. ft. warehouse would be approximately $13,334 per year. However, $1,200 of that sum represented the estimated cost of resident building managers. In this case, the actual cost of the resident building manager with regard to the subtenant leasing 70,000 sq. ft. is known and has been accounted for. Accordingly, the monthly administrative expenses are $1,011, representing 1/12 of $12,134 ($13,334 less $1,200).

$.02 per sq. ft. - in the sum of $2,000 were immediately needed to restore these premises (Tr. 32-33). Therefore, even defendants' marginal profit before taxes is subject to severe reduction, at least for the present year, from $319 to $153 per month ($2,000 divided by 12 = $166).

It is noteworthy in this connection to observe that even the Receiver does not seriously question the marginal nature of this leasehold. Exhibit A annexed to the Receiver's brief concedes that the "profit" earned by this building, prior to taxes, is less than $400 per month.*

In his opinion, Judge Babitt concluded that there was no need to precisely determine the extent to which Debtor's profited from each lease (Opinion p. 14). Nevertheless, it is illuminating that in the premises that the Receiver specifies for individual treatment, there is, in fact, virtually no profit being earned by Debtor .

* Debtor's brief takes issue with the amount allocated by the Court to each premises as a result of administrative expenses. (Pp. 10-12). Debtor's position is difficult to comprehend since the figures utilized by the Court were agreed to by all parties following a long hearing on April 18, 1974. While Debtor and the Receiver may well have managed to reduce expenditures, the number of properties currently leased to which allocation of administrative expenses can be made has decreased markedly, thereby increasing the percentage of administrative expenses attributable to each remaining building. But the fundamental point is that there must be an end to litigation and all parties are bound for better or worse by the record adduced at trial.

B. Debtor's Defaults

In his brief, the Receiver argues that the pre-petition defaults relating to Jacksonville #3 amount to a total of only $3,000 (Receiver's Brief pp. 37, 51-52). Unfortunately, for Landlord, this figure bears little resemblance to reality.

In May 1973, Debtor defaulted in its obligation to pay rent to Landlord. Rent was similarly not paid for the months of June, July, August and September 1973, and a total of $21,900 was due and owing by Debtor to Landlord as of that date. Additionally, real property taxes for the year 1972 in the sum of $11,781.81 were not paid by Debtor (Exhibit C to the Complaint in evidence).

Because of the Debtor's defaults, Landlord was compelled to commence litigation in both the State and Federal Courts of Florida seeking to evict Debtor from the premises and recover monies owed by Debtor. Landlord obtained a final judgment granting inter alia the issuance of a writ of possession, but the issuance of the writ was temporarily stayed by the Florida Appellate Court (Ibid.).

On October 11, 1973, the parties entered into a Stipulation in the United States District Court for the Middle District of Florida whereby Debtor agreed to pay into Court, the back rent, together with interest, amounting

in all to $22,300.32. Additionally, the outstanding real estate taxes for the year 1972 and rent for the month of October 1973 was to be paid to Landlord. This amount was paid by the Debtor but Debtor immediately defaulted in its payment of November, 1973 rent. Subsequently, plaintiff was able to secure payment of most of the November rental by virtue of a commercial surety bond posted in the Florida proceedings.

To date, however, despite the fact that more than $22,000.00 is concededly due and owing to Landlord as a result of past due rent, no portion of same has ever been received by Landlord.*

Furthermore, defendants have neglected to pay the

* In the lower Court, the Receiver sought to argue that at trial, there had been a tender of the $22,000.00. The transcript clearly reveals that Mr. Sandler's offer to make available the monies in the Florida Court was conditioned by the language "if it can be done consistent with the Bankruptcy Act" (Tr. 9). At the trial, the attorney for the Creditors Committee immediately advised the Court that in his opinion, such action might well be a voidable preference and thus improper (Tr. 11). Obviously, that is not the stuff of which tenders are made.

Furthermore, in his brief the Receiver concedes that no tender of pre-petition arrears can be made, except as part of a plan (Receiver's brief p. 34). Accordingly, it would appear that the Receiver has abandoned this contention. In all events, the Court found that there has been no tender by defendants (Opinion p. 27).

1973 real estate taxes, payment of which is required by the lease (Section 4.01). Applicant's Exhibit A in evidence establishes that the taxes as of February 1974 for the year 1973 were $10,660.72 and the pre-petition portion is equal to $9,772.33 (11/12 of $10,660.72).

In its brief, the Receiver refers to a ruling by the Court in a different case (Tampa #3) as somehow establishing the law in the instant case that since the 1973 taxes did not come due until April 30, 1974, there was no default of which the Court could take cognizance. (Receiver's brief pp 30-31, 37n). First, it shall be noted that no such ruling was made in the instant case. Second, it is respectfully submitted that to the extent that the Court in the Tampa #3 case so ruled, the Court erred.*

Obviously, a Landlord could properly file a proof of claim with regard to the 1973 taxes which had not been paid (see Section 63 of the Bankruptcy Act) and just as obviously, the Receiver was not prepared to pay the 1973

* Indeed, a reading of the Court's decision, rendered from the bench, reveals that this point was touched on by the Court only in dicta - in a portion of one sentence - and accordingly it is apparent that the thrust of the Court's decision was that on the basis of all the facts in that case, the Court determined to exercise its equitable discretion. See infra.

taxes attributable to the pre-petition period.*

Accordingly, it would be strange, to say the very least, for a Court to be compelled to close its eyes to the reality of the situation. That reality is that the Landlord in the instant case is out-of-pocket an additional $9,000 because of the default of Debtor in paying taxes due under the terms of the lease. As the Receiver and Debtor are quick to emphasize, this is a court of equity and as such one of the most pertinent factors is that the Landlord has had to pay taxes, which were properly payable by Debtor.

Additionally, defendants have defaulted in their obligation under the terms of the lease between the parties (Section 6.02) to make all necessary repairs to the premises. The testimony of Mr. Murray Guy, an employee of the Receiver, revealed that an additional $2,000 in immediate repairs, over and above the normal costs of maintenance was needed (Tr. pp 32-33).

Therefore, rather than the $3,000 which the Receiver claims is the amount of the pre-petition default, the true sum is in excess of $33,000.

* At the trial of the instant matter, Mr. Sandler, counsel to the Receiver, informed the Court with regard to the payment of 1973 taxes, as follows:

> "Mr. Sandler: ...I think it's safe to say that the Receiver will not pay on April 30th, 1974 the other eleven months." (Tr.4)

Furthermore, there has been yet another default by Debtor in the instant case. Paragraph 3 of the Stipulation provided that Debtor agreed to continue to pay rentals in accordance with the terms of the lease and paragraph 4 provided, in pertinent part, as follows:

> "Defendants ... further stipulate and agree that upon default in the payment of rentals or other amounts contemplated by this Stipulation, they will ... immediately surrender possession of the subject premises." (Emphasis supplied)

Rent for the very next month of November 1973 was not paid by Debtor (Answer to Request for Admission No. 8).

Accordingly, wholly aside from the bankruptcy clause in the lease, Debtor violated a Stipulation entered into in the United States District Court. The importance of this breach cannot be overemphasized. Defendants come before this Court seeking extraordinary equitable relief. As such, they must enter the Court with "clean hands".

In this case, Debtor defaulted in its contractual obligations to pay rent and taxes. Debtor was given a second chance by Landlord and the Stipulation was executed by counsel for the parties. Landlord executed the Stipulation in good faith and it was presumed by Landlord that

Debtor was also acting in good faith. However, the fact that Debtor violated the terms of the Stipulation by defaulting in the payment of the very next month's rent cannot be ignored. This event obviously casts doubt on the good faith of Debtor when he entered the Stipulation, which Stipulation had the effect of forestalling the issuance of the writ of possession from the State Court (Exhibit C to the Complaint). But even if Debtor was acting in complete good faith when he authorized the signing of the Stipulation, its failure to pay the November rent violated the provisions of the Stipulation and mandated the surrender of possession.

Summarizing the facts, there have been numerous defaults by Debtor in connection with this lease. Debtor defaulted in its payment of many months payment of rent and taxes and Landlord was compelled to commence suit to remedy these defaults and regain possession of the lease. Debtor was given another chance when the Stipulation was executed and Debtor immediately breached that Stipulation. To date, Landlord has not received $22,300 in rents which are concededly owed by Debtor. Taxes in excess of $9,000 are similarly owed, and repair defaults of approximately $2,000 exist.

ARGUMENT

POINT I

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN ENFORCING THE TERMINATION CLAUSES IN THE RESPECTIVE LEASES

A. Abuse of Discretion Standard

Despite the prolixity of the briefs filed by appellants, nowhere is there a discussion of the controlling standards of review on this appeal. This glaring absence is hardly surprising because such a discussion inevitably leads to an affirmance of the trial court's decision.

Rule 810 of the Bankruptcy Rules adopts the language of Rule 52(a) of the Federal Rules of Civil Procedure in providing as follows:

> "Upon an appeal the district court... shall accept the referees findings of fact unless they are clearly erroneous, and shall give due regard to the opportunity of the referee to judge the credibility of the witnesses." (Emphasis supplied."

"Clearly erroneous" and "credibility of witnesses" are the operative words in Rule 810. Bankruptcy Judge Babitt performed virtually a herculean task in fairly, patiently and painstakingly taking testimony in each of the twenty cases now pending on appeal. (Opinion pp 13-14)* The transcripts of these trials reveal that extensive testimony was adduced from witnesses called both by the landlords and by defendants concerning the nature and magnitude of the defaults occasioned by the conduct of Debtor, as well as the consequences to the landlords. To state that Judge Babitt was in a unique position to evaluate the credibility of the witnesses is merely to emphasize the obvious.

* Debtor's attack on the integrity of the Court is both shocking and completely baseless. Isolated, out-of-context quotations from proceedings, which were not even made a part of the record of appeal by Debtor, obviously fail to show a prejudgment by the Court. Indeed, if Debtor was convinced that the trial judge had prejudged this case, one would have assumed that a motion to recuse would have been filed. No such motion was made.

For purposes of review, the essence of Judge Babitt's decision is contained in a single sentence therein which held:

> "The Court concludes that the termination clauses in issue are enforceable against the Debtor, and on the facts here, and in the exercise of its equitable jurisdiction finds and concludes that they should be enforced." (Emphasis supplied) (Opinion p. 30)

It is the appellant's basic premise, relying on the recent decision of the Court of Appeals for the Second Circuit in In the Matter of Queens Boulevard Wine & Liquor Corp. v. Blum, F.2d (2d Cir. Jun 11, 1974), and other cases that the bankruptcy court has the equitable power, in its discretion, to prevent enforcement of a termination clause. After carefully weighing the testimony, Judge Babitt determined that it would be inappropriate to exercise that discretion in this case. The scope of appellate review of such a discretionary decision is extremely narrow. Put simply, the trial court's decision will not usually "be set aside in the absence of a clear showing of abuse of discretion." Garber v. Randall, 477 F.2d 711, 714 (2d Cir. 1973).

In Beshear v. Weinzapfel, 474 F.2d 127, 134 (7th Cir. 1973), the Court set forth the standard of review of a discretionary determination as follows:

> "'Generally, an appellate court may set aside a trial court's exercise of discretion only if the exercise of such discretion could be said to be arbitrary.' Sears, Roebuck and Co. v. American Mutual Liability Insurance Co., 7 Cir., 372 F.2d 435, 438 (1967). '[D[iscretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.' Delno v. Market St.Ry. Co., 9 Cir., 124 F.2d 965, 967 (1942).'"

To the same effect, see Nichols-Morris Corporation v. Morris, 272 F.2d 586, 589 (2d Cir. 1959); O'Donnell Transp. Co. v. City of New York, 215 F.2d 92, 95 (2d Cir. 1954). The same standard of review applies in appeals from the Bankruptcy Court. As was stated by Judge Weinfeld in In re New York Investors Mutual Group, 143 F. Supp. 51, 56 (S.D.N.Y. 1956):

> "To overcome the Referee's order it must be established that his findings were clearly erroneous. And in this instance there is involved a matter of business judgment and discretion which

will not be disturbed unless there is a clear abuse of discretion." (Emphasis supplied)

The Queens Boulevard decision supra. is wholly consistent with the trial court's decision. There, Judge Timbers, writing for a divided panel, merely held that "under the particular circumstances of this case" a termination clause would not be enforced (Slip opinion p. 10). Judge Babitt has set forth fully in his decision the factors distinguishing the instant case from Queens Boulevard and the Court is respectfully referred thereto (Opinion pp. 25-30).

B. The Trial Court Properly Exercised Its Discretion

It is a commonplace but apt expression that equity is a "two-way street." In furtherance of this principle, the Courts have developed the doctrine that equitable relief will only be granted where the party seeking relief has "clean hands".

One of the leading cases in this Circuit enunciating this doctrine is United States v. Forness, 125 F.2d

928 (2d Cir.), cert denied, 316 U.S 694 (1942). There, the United States brought suit on behalf of the Seneca Nation to enforce cancellation of a lease for non-payment of rent. Defendants contended that since they had made a tender of the owed rent, the Court should exercise its equitable powers and grant relief against a forfeiture of the lease. Judge Frank rejected defendants' argument noting:

> "[I]t is equallywell established that ...such relief [against forfeiture] will be granted only to an innocent suitor, i.e., one with clean hands. This requirement bars relief to one who has been negligent - or at least grossly so - or who has inexcusably or deliberately gone into default." 125 F.2d at 140 (Emphasis supplied).

And as was said in Brewster v. Lanyon Zinc Co., 140 Fed. 801, 819 (8th Cir. 1905):

> "[T]here is no insuperable objection to the enforcement of a forfeiture when that is more consonant with the principles of right, justice and morality than to withhold equitable relief."

This doctrine of clean hands is, of course, equally applicable in bankruptcy proceedings. Bolling v Bowen, 118 F.2d 59 (4th Cir. 1941).

Defendants seek to invoke the equitable processes of the Court in order to prevent "windfall profits" to Landlord. It is submitted that it has been amply proved that this lease does not generate profits and much less windfall profits. This has been a losing leasehold from the inception and the experience of the Receiver has not been to the contrary. Sizeable sums have already been lost through the retention of this property and further retention will only result in additional losses as the subleases expire. By all fair analyses, Jacksonville #3 is, at best, a breakeven leasehold.

Accordingly, even under the most favorable conditions, there was little reason for the Court to consider utilizing its equitable powers in this case. When one considers the harm that has already been done to Landlord by Debtor, the denial by the Court, in its discretion, of the grant of equitable relief is obviously correct.

Bankruptcy Judge Babitt found on the basis of the totality of the evidence adduced at the trial that "the landlords have been seriously impeded" (Opinion p.24), that the defaults were "staggering", and that "many of the landlords have had to invest further funds of their own to keep mortgages and tax gatherers at bay" (Opinion p. 27). Based on these, as well as other findings, the Court concluded that "the so-called equitable concerns are simply not robust enough to turn these landlords away" (Opinion p. 29) and in the exercise of its discretion, enforced the termination clauses against Debtor (Ibid.).

In its brief, the Receiver argues that the Court erred in failing to consider the rent defaults for each property on a building-by-building basis (Receiver's brief pp. 30-40). This argument is fallacious. It was altogether proper for the Court to analyze the overall conduct of Debtor in causing the "staggering amounts" of defaults to occur in weighing whether or not to grant the extraordinary equitable relief sought in any particular case. This is merely another application of the "clean hands" doctrine.

Receiver's reliance on the oral decision of the trial court in Tampa #3 is equally misplaced.* First, the Court emphasized that its ruling was based "on the very limited and narrow facts presented in this dispute." (Exhibit B to Receiver's brief p. 50). Those facts included in addition to the absence of rent default or as far as appears any repairs default, a persuasive argument that the Landlord for Tampa #3 had been guilty of laches in instituting litigation. Despite the filing of the petition for an arrangement on November 16, 1973, it was not until April, 1974 - some five months later - that Landlord commenced its adversary proceeding. Obviously, in balancing the equities, the Court took into account Landlord's inaction.

The point to be emphasized is that the decision of the Court in Tampa #3 relates to that case and that case alone. Under the peculiar circumstances therein, the Court concluded that Landlord was not "impeded" (Id. at 51) and

* The Landlord has appealed from Judge Babitt's decision and that appeal is pending in the District Court.

that in the exercise of the Court's discretion, possession would not be granted to Landlord. In the exercise of its discretion, after evaluating the totality of the evidence in the twenty cases involved in the instant appeal, the Court denied equitable relief.

The record in these cases is replete with the evidence of the wrongful conduct of the Debtor with regard to both the Landlord in general and the Landlord of Jacksonville #3 in particular. The findings of the Court are amply supported by the record and there are no "compelling equitable and policy considerations" that mandate non-enforcement of the termination clauses. In re Queens Boulevard Wine & Liquor Corp. v. Blum, supra at p. 7. On the contrary, the equities are all on the side of Landlord and the trial court did not abuse its discretion in so ruling.

POINT II

THE TRIAL COURT DID NOT ERR IN DECLINING TO MAKE SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW IN EACH OF THE TWENTY RELATED PROCEEDINGS

The Receiver, realizing the tenuousness of its position on the merits of this appeal, seeks a remand to the trial court by contending that Judge Babitt failed to comply with the provisions of Rule 752 of the Bankruptcy Rules in that there was a failure "to find the facts specially and state separately its conclusions of law thereon." Receiver's contention is devoid of merit and a remand will serve no useful purpose and merely occasion additional delay to Landlords who have already been severely damaged.

Rule 752 provides, in pertinent part, as follows:

> "If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appeared therein."

Receiver concedes that the Court may utilize the opinion to make any necessary findings, but contends that the Court committed reversible error in not making separate findings of fact with regard to each of the twenty proceedings

(Receiver's Brief, p. 49). Indeed, Receiver argues that special findings must be made for each of the various Debtors.

This last contention is patently frivolous since it is the Receiver who has moved to consolidate the various Debtors on the ground that the various entities were merely instrumentalities of one corporation, controlled by Dan Overmyer.

The purposes of findings of fact are well summarized by Professor Moore as follows:

> "As an aid in the trial judge's process of adjudication; for purposes of res judicata and estoppel by judgment; and as an aid to the appellate court on review." 5 A. Moore's Federal Practice § 52.06 [1] p. 2706.

Only the last purpose - to aid the appellate court - is pertinent in this case.

The ultimate test as to the adequacy of findings is whether they are sufficient to form a basis for the decision and whether they are supported by the evidence. Id. at p. 2710. And in making such a determination, "it is well to remember that findings are to be construed liberally in support of a judgment or order [and]...whenever, from facts found, other facts may be inferred which will

support the judgment, such inferences will be deemed to have been drawn." Triangle Conduit & Cable Co. v. FTC, 168 F.2d 175, 179 (7th Cir 1948), aff'd, 336 U.S. 956 (1949).

The reluctance of an appellate court to remand for further findings is well illustrated by Rossiter v. Vogel, 148 F.2d 292, 293 (2d Cir. 1945), where Judge Clark held:

> "The findings thus made were more directly apposite to the judge's theory than to the one we set forth. But since the judge's view is quite clear, as was also the evidence, we see no occasion to return the case for more findings. For findings 'are not a jurisdictional requirement of appeal', but only 'aid appellate courts in reviewing the decision below'; and defects therein may be waived where 'the error is not substantial in the particular case.'" (Emphasis supplied).

Accordingly, as in so many areas of the law, it is the substance not the form that counts. Judge Babitt's thirty page opinion is both a scholarly recital of the applicable law and a comprehensive application of that law to the facts of these cases. Of course, Judge Babitt did not make specific findings for each of the twenty properties. Such findings were hardly necessary.

Instead, the Court found that each of the twenty landlords were "seriously impeded" (Opinion p. 24) as a result of Debtor's defaults, which were of staggering proportions (Id. at 27), and that although the leases were profitable to Debtor (Id. at 14), under the circumstances of these cases the "so-called equitable concerns are simply not robust enough to turn these landlords away." Id. at 29.

The basis of the opinion is thus clear and the evidence supporting the Court's opinion is ample. There is simply no warrant for remand. As was said by Mr. Justice Harlan, then Circuit Judge, in O'Donnell Transp. Co. v. City of New York, 215 F.2d 92, 95 (2nd Cir. 1954):

> "We do not think it fatal that the Court, in its short opinion, failed to detail all the circumstances supporting its decision. Those circumstances were clearly before the Court and the decision was obviously rendered in light of them. Once it is clear that a trial court has acted on a discretionary basis, the exercise of discretion is generally not disturbed on appeal where there are good reasons to support its action." (Emphasis supplied).

CONCLUSION

Defendants, in order to prevail, must demonstrate that Judge Babitt abused his discretion in declining to exercise the extraordinary relief sought by them. With the full record now before the Court, the speciousness of the defendants' argument is exposed. Equity should, indeed, be done by this Court and can only be accomplished by the affirmance of Judge Babitt's decision.

Dated: New York, New York
September 5, 1974.

Respectfully submitted,

ZALKIN, RODIN & GOODMAN
Attorneys for Appellee
750 Third Avenue
New York, New York 10017

Of Counsel:
Richard S. Toder

COPY RECEIVED

NOV 8 1974

BOOTH, LIPTON & LIPTON

Attys for Avnet

COPY RECEIVED
LEVY, LEVY & RUBACK

ATTYS. FOR

DATE November 8/1974